No. 80-1291

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HADWEN, INC.,

Appellant

v.

VERMONT DEPARTMENT OF TAXES,

Appellee

On Appeal from the Vermont Supreme Court

MOTION TO DISMISS

Paul P. Hanlon
Deputy Commissioner
and General Counsel
Vermont Department of Taxes
P.O. Box 694
Montpelier, Vermont 05602
802 828-2805
Attorney for the Appellee

Table of Contents

Page

Table of Authorities ii

Motion to Dismiss 1

Statement of the Case 1

Argument

No Substantial Question Not Previously Decided By This Court Is Raised By This Appeal 2

Conclusion 5

TABLE OF AUTHORITIES

Cases:	page(s)
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)	3
Colgate v. Harvey, 296 U.S. 404 (1935)	5
Kahn v. Shevin, 416 U.S. 351 (1974)	5
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	3
Maxwell v. Bugbee, 250 U.S. 525 (1919)	5
McGowan v. Maryland, 366 U.S. 420 (1961)	3
New Orleans v. Dukes, 427 U.S. 297 (1976)	3
Ohio Oil Co. v. Conway, 281 U.S. 146 (1930)	5
Statutes:	
VT. STAT. ANN. tit. 32, §9741(14)	1, 2
VT. STAT. ANN. tit. 32, §9741(15)	2
VT. STAT. ANN. tit. 32, §9771(1)	2
1969 Vt. Acts, No. 144, §1	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1291

HADWEN, INC.,

Appellant

v.

VERMONT DEPARTMENT OF TAXES,

Appellee

On Appeal from the Vermont Supreme Court

MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein on the ground that the question presented is not substantial enough to warrant further argument.

STATEMENT OF THE CASE

This appeal concerns a decision of the Vermont Supreme Court upholding the constitutionality of an exemption from Vermont's sales and use tax. VT. STAT. ANN. tit. 32, §9741(14) exempts sales of materials which become part of manufactured property or which are consumed in the manufacturing process. Such materials are exempt from tax only if they are to be used in the manufacture of goods "for sale".[1]

[1] In relevant portion, the statute exempts sales of:

> (14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property *for sale* . . . .

VT. STAT. ANN. tit. 32, §9741(14) (emphasis added).

The Appellant prints an advertising circular called the Pennysaver which it distributes free of charge. Because the Appellant concededly makes no sale of the Pennysaver, its purchases of materials and supplies to print the Pennysaver do not qualify for the manufacturing exemption. Unless exempt, Appellant's purchases of printing supplies and materials are taxable as retail sales under VT. STAT. ANN. tit. 32, §9771(1).

Although barred from the manufacturing exemption by its terms, the Appellant claims exemption from the tax on an equal protection theory, comparing itself to newspaper publishers who sell their newspapers to the public and receive the exemption on the purchase of their printing materials and supplies.[2] The Appellant points to an exemption for the sale of newspapers[3] to complete its equal protection argument, asking the Court to find that the rationale behind the manufacturing exemption has no legitimate purpose when applied to newspaper publishers because of this separate exemption for the sale of their product.

ARGUMENT

No Substantial Question Not Previously Decided By This Court Is Raised By This Appeal.

The statutory classification

The manufacturing exemption, VT. STAT. ANN. tit. 32, §9741(14), creates a distinction between those who manufacture their products for sale and those who manufacture products for their own use or for distribution without sale. The exemption is challenged in this appeal because of the requirement that the manufactured goods be sold, and it is this requirement alone

---

[2] While characterization of the Pennysaver as a "newspaper" is essential to this comparison, no First Amendment issue has been raised in this appeal.

[3] At the time of the assessment, the exemption referred only to sales of newspapers. 1969 Vt. Acts, No. 144, §1. The current statute exempts both sales of newspapers and sales of materials and supplies incorporated into a newspaper (whether sold or distributed without charge), but only if the publication contains at least ten percent news of general or community interest. VT. STAT. ANN. tit. 32, §9741(15).

which must withstand equal protection scrutiny. The statute does not, on its face, classify "newspapers" in any way, and newspaper publishers are treated no differently from other manufacturers. Treatment among manufacturers differs only to the extent that the manufactured goods are sold or not sold.

The equal protection test

Where, as here, the challenged statute creates a classification which calls into question no fundamental constitutional guarantee other than equal protection, the Constitution requires only "that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). State statutes are afforded a presumption of constitutionality, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961), and where the states' ability to enact revenue measures is involved, the Court has allowed the states "very wide discretion" in developing laws with the "flexibility and variety that are appropriate to reasonable schemes of state taxation." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959).

Application of the test

The manufacturing exemption promotes the overall purpose of the Vermont sales and use tax, which is to levy the tax on the final user of a product. The purpose is served by the exemption in two ways: where the materials purchased by a manufacturer are incorporated into a product which is then sold, no tax is collected at this intermediate level; and where the materials go into a product which is not sold, but used by the manufacturer (or distributed without charge), the tax is payable because the manufacturer is the final user. The Vermont Supreme Court recognized this purpose in its opinion in this case when it stated:

> Subsection (14), the so-called "manufacturer's exemption," is intended to fix the point of excise on the last retail transaction in the production process by exempting prior transactions.

Appellant's Jurisdictional Statement at 7a. The "for sale" require-

ment of the exemption thus has a rational relationship to the legitimate state interest of generating revenues from an excise on the final user of a product.

The Appellant, however, argues that the interest of the state in exempting a manufacturer's materials is no longer supportable where the final sale of the manufacturer's product is not taxed. If such an argument were accepted, the outcome would not be extension of the exemption to the Appellant, as it requests, but denial of the exemption to manufacturers whenever a sale to the final user of the manufacturer's product is not taxed.

But qualification for the exemption cannot depend upon the actual taxation of the product upon its final sale, because such a test would be impossible to administer. At the time raw materials are purchased by the manufacturer, it is impossible to know whether the final sale will be taxable as a retail sale in Vermont, exempt under a specific relief provision, or excluded from the tax by virtue of an out-of-state sale. The purpose of the exemption is to shift the focus of the tax consequences to the final transaction, whether those consequences be taxation or exemption, not to insist that the final transaction be taxed.

Although the state has demonstrated a legitimate purpose behind the classification contained in the manufacturing exemption, the Appellant asks that the statute be tested in a specific factual setting. Since newspaper publishers who sell their newspapers are exempt from taxation on the materials incorporated into their product, and their newspapers are also exempt when sold, the Appellant reasons that the legislature must have intended to benefit the newspaper industry as a whole. Therefore, the reasoning continues, the Appellant must also be exempt, or the two exemptions, read together, are unconstitutional.

Such an analysis fails for two reasons. First, as a matter of legislative intent, the Vermont Supreme Court concluded that there was no necessity to construe the two exemptions together. Appellant's Jurisdictional Statement at 6a. The Court's conclusion was based on findings that the two exemptions served different purposes, each valid and rational. The manufacturing exemption fixes the point of excise on the last retail transaction by exempting intermediate transactions, and the newspaper exemption allows small sales (often by "minors, acting as 'independent merchants' ") to be exempt. Appellant's Jurisdictional Statement

at 8a.

The Appellant's analysis must also fail because decisions of this Court establish that judgment of a classification by its result in a particular instance is neither necessary nor desirable:

> The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell v. Bugbee*, 250 U.S. 525, 543.

Colgate v. Harvey, 296 U.S. 404, 436 (1935). The Court has consistently refused to look behind a statutory classification in search of an impermissible category because to do so would subject state legislatures to an "intolerable supervision" by the Court of their attempts to achieve rational economic structures for their states. *Kahn v. Shevin*, 416 U.S. 351, 356 (1974); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930).

The categories created by Vermont's manufacturing exemption did not result from hostile discrimination, but were developed as part of a rational taxing plan. No further supervision need be undertaken by this Court.

CONCLUSION

Wherefore, Appellee respectfully submits that no substantial question not previously decided by this Court is raised by this appeal, and Appellee respectfully moves the Court to dismiss this appeal.

Dated at Montpelier, Vermont this 20th day of April, 1981.

Respectfully submitted,

Paul P. Hanlon
Attorney for Appellee

Certificate of Service

I hereby certify that on this 20th day of April, 1980, three copies of this motion to dismiss were mailed, with first class postage prepaid, to Eugene V. Clark, Esq., Clark, Lillie and Holden, 204 Union Street, Bennington, Vermont 05201, Counsel for the Appellant. I further certify that all parties required to be served have been served.

Paul P. Hanlon
Deputy Commissioner and
General Counsel
Vermont Department of Taxes
P.O. Box 694
Montpelier, Vermont 05602
Attorney for Appellee